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ABSTRACT

This publication is intended to ensure that consideration for and provision of extended school year services (ESY services) for students with disabilities are consistent with the requirements of federal law, Iowa state rules, and Iowa's adopted educational standards. Part 1 of the document discusses the specific addition of ESY services to the Individuals with Disabilities Education Act (IDEA) regulations in 1999. Part 2 explores the newest directives in IDEA and in the 2000 Iowa Administrative Code, as well as the most recent and the most authoritative precedents and policy directives concerning the ESY services. Part 3 defines ESY services. Part 4 discusses the three basic requirements of ESY services, including: (1) all children who are eligible for special education and related services are to be considered for ESY services; (2) all relevant information relating to the individual needs of the child must be considered; and (3) parents have the right of full participation in the development of the Individualized Education Program, which includes the ESY services decision, and they must be fully advised of their rights. Part 5 describes specific standards for implementing Iowa's ESY services rule. Parts 6 and 7 explore related issues of concern and best practices. (CR)

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Iowa Standards for Students with Disabilities

Extended School Year (ESY) Services

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Part I
Introduction

This publication has been written with the intent to ensure that consideration and the provision of extended school year services (ESY services) are consistent with the requirements of the federal law and regulations, the state rules, and the state adopted standards. Federal regulations give each state flexibility to establish its own standards for determining eligibility for ESY services. State standards are applied in a consistent manner to children with disabilities who require such services in order to receive a free appropriate public education (FAPE).

This guidance document is largely based on a Field Edition that was disseminated in February 1997. The Field Edition was developed by a state Ad-Hoc Committee that met over a period of two years to examine ESY services issues. The impetus for detailed guidance was primarily for these reasons:

1. There was an apparent inconsistency in the interpretation and application of the rule across the state.
2. There was an apparent inconsistency of views on the extent to which parents and guardians seek ESY services for their children (or would seek those services if they were available).
3. Reform was mandated by the United States Department of Education following a state monitoring visit report (1994).
4. There was concern that if the state rule was interpreted too literally or too strictly, it could be subject to challenge in the courts.

The Field Edition sought to solicit input to determine whether the document was helpful in meeting its purpose, which was to "establish a common philosophy and general understanding of the law applicable to EYSE." A technical manual was developed entitled *Their Future. . .Our Guidance* that included a chapter about ESY services; numerous inservices were provided across the state.

When the Individuals with Disabilities Education Act (IDEA) regulations were implemented in 1999, extended school year services were specifically added for the first time. It became apparent that the Field Edition needed to be revised. Another committee was convened and this document is the result of this group's commitment to ensure that children with disabilities who require ESY services will receive the services they need.

Part II
The Primary Authorities for This Document

In preparing this document, the authors have relied on the newest directives in IDEA 97 and the 2000 Iowa Administrative Code (sometimes referred to as the Iowa Administrative Rules of Special Education) as well as the most recent and the most authoritative precedents and policy directives at their disposal. This part identifies those authorities and explains why they are deemed to be particularly important. Individuals interested in a more complete analysis of some of the issues discussed may wish to consult these authorities directly.

Authority No. 1:
IDEA Amendments of 1997
34 CFR Section 300.309 and Analysis of Comments and Changes

34 CFR Section 300.309 Extended school year services.

(a) General.

(1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's individualized education program (IEP) team determines, on an individual basis, in accordance with Section 300.340–300.350, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not
- *(i) Limit extended school year services to particular categories of disability; or*
- *(ii) Unilaterally limit the type, amount, or duration of those services.*

(b) Definitions. As used in this section, the term extended school year services means special education and related services that–

(1) Are provided to a child with a disability–
- *(i) Beyond the normal school year of the public agency;*
- *(ii) In accordance with the child's IEP; and*
- *(iii) At no cost to the parents of the child; and*

(2) Meet the standards of the SEA.

As can be seen above, the final regulations specify that states may not limit eligibility for ESY services based on disability or severity level and may not limit types, amounts, or duration of services.

Authority No. 2:
Iowa Administrative Code (2000)
281–41.80 IAC

41.80 (256B,34 CFR300) Extended school year services. *Each public agency shall ensure that extended school year services are made available as necessary to provide FAPE.*

41.80(1) *Definition. Extended school year services means special education and related services that are provided to an eligible individual beyond the normal school year of the public agency in accordance with the eligible individual's IEP at no cost to the parents of the eligible individual and that meet the standards of the department.*

41.80(2) *Basis for determining need. Extended school year services must be provided only if an eligible individual's IEP team determines, on an individual basis, in accordance with rules 41.60(256B,34CFR300) to 41.70 (256B,34CFR300) that the services are necessary for the provision of FAPE to the eligible individual. In implementing the requirements of this rule a public agency may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount or duration of those services.*

Authority No. 3:
Other Case Law

The IDEA Amendments of 1997 and implementing regulations (1999) reflect several well established principles intended to guide individualized education program (IEP) teams in considering the need for ESY services. This includes the responsibility IEP teams have for providing *meaningful benefit* for students receiving special education, the need to carefully consider program decisions that may *mitigate such benefit* and the *broad criteria* for judging what constitutes an appropriate program for a given student.

As stated elsewhere in this document the decisions made by an IEP team, on an individual basis, of what constitutes an appropriate program for a given student serves as the lynchpin for deciding the need for ESY services. The Supreme Court in *Rowley* established that this appropriateness decision is governed by the standard of whether the student is receiving some benefit (a "basic floor of opportunity") rather

than a maximum benefit standard that may be sought by parents and advocates. Subsequent decisions (*Polk v. Central Susqueshannan*, Third Circuit, 1988) have asserted that this "basic floor" is intended to extend beyond minimal benefit to require a program that provides for *meaningful benefit*. As stated in *Polk*:

> Although the tenor of the *Rowley* opinion reflects the Court's reluctance to involve the courts in substantive determinations of appropriate education and its emphasis on the procedural protection of the IEP process, it is clear that the Court was not espousing an entirely toothless standard of substantive review. Rather, the Rowley Court described the level of benefit conferred by the Act as "meaningful."

The particular reference to the *Rowley* decision relates to the Supreme Court's assertion that:

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful.

The *Polk* decision went on to caution educators about applying too weak a standard of benefit. In reversing a lower court ruling the court stated:

> . . . in our view, the danger of the district court's formulation is that under its reading of Rowley the content of any benefit, no matter how small, could qualify as "appropriate education" . . . Just as Congress did not write a blank check, neither did it anticipate that states would engage in the idle gesture of providing special education designed to confer only trivial benefit.

This *meaningful benefit* criteria would seem to lie at the heart of decision making in ESY services matters in which the IEP team must decide whether the failure to provide these ESY services leads to a program that does not provide such benefit. Other courts (*Alamo Heights v. State Bd. of Ed.*, 1986) have spoken to this issue:

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> The some-educational-benefit standard does not mean the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought "to a virtual standstill" . . . The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. This is, of course, a general standard, but it must be applied to the individual . . . in the same way that juries apply other general legal standards such as negligence and reasonableness.

This document will address in Part V the standards recommended in Iowa for examining the need for ESY services. The standards have relied on guidance from courts regarding such decision making, including *Johnson v. Bixby* (1990), a decision from the Tenth Circuit. This case asserts that, in addition to regression-recoupment criteria, there is a need to consider many factors in applying the appropriateness threshold.

The remainder of this document is intended to provide guidance to Iowa educators and parents regarding the strategies critical to considering such retrospective and predictive data in this area of decision making.

Part III
The Definition of
Extended School Year Services

The interpretation and application of ESY services has proven confusing and difficult for area education agencies (AEA), local education agencies (LEA), and parents for several reasons, the most notable of which is that the law has been in the process of change. The 1997 IDEA statute does not specifically mention ESY services, but the requirements for ESY services are made very clear under the description of a free appropriate public education (FAPE) in the regulations 20 U.S.C. 1412 (a)(1). *ESY services* appears for the first time in the IDEA regulations (1999). Another issue, which adds some confusion is that decisions rendered by administrative law judges (ALJs) and courts just a few years ago may no longer be an accurate guide to resolving the ESY services question.

Comments from the federal regulations reinforce the necessity of making individualized determinations regarding the provision of ESY services. The Comments explain that states should have flexibility in determining eligibility for ESY services, but that those decisions must be made in accordance with IEP and placement requirements. The Comments further note that state standards should ensure that FAPE is provided consistent with the individually oriented focus of the Act and that they do not limit eligibility for ESY services to children in particular disability categories.

Because the legal authority for ESY services is an *appropriate* education, this does not mean that ESY services duplicate the programs provided during the regular school year. The Comments section of the regulations state:

> Typically ESY services would be provided during the summer months. However, there is nothing in the definition of ESY services in Section 300.309(b) that would limit the ability of a public agency to provide ESY services to a student with a disability during times other than the summer, when school is not in session, if the IEP team determines that the child requires ESY services during these time periods in order to receive FAPE.[1]

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[1] **Comment Section IDEA 97**, page 12576.

Any services provided beyond the regular school year by the LEA and/or AEA constitute an ESY services program if the following conditions are met:

(1) The IEP team has made an individualized determination that there is a need for such services to ensure an appropriate education for a student with a disability.

(2) The need and the services are documented in the individualized education program (IEP).

(3) The services are accessed or provided by a public educational agency.

(4) There is no cost to the parent.

(5) The student's progress is monitored by appropriate special education personnel.

While the discussion has focused on extended school year services it should be noted that a similar analysis can be applied in situations in which an extended day program is determined to be necessary in order for a student with disabilities to receive FAPE. This could be applied, for example, in a situation involving a kindergarten student attending a districtwide partial day program who requires a more intensive program.

Depending on the needs of the individual child, the ESY services provided might be significant–such as extended tutoring or full-time structured programming. On the other hand, those services might be relatively minor and inexpensive–such as the provision of a computer program accessible at the local library. According to a guidance and clarification memorandum sent to the field by the Iowa Department of Education (January 18, 1996),

> Perhaps a computer program or student training in skills maintenance techniques will meet the need; perhaps accessing an existing community resource such as a summer recreation program will meet the need. If so, the provision of those services will satisfy the requirements of the rule.[2]

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[2] Memorandum from Dr. Jeananne Hagen to AEA Directors of Special Education and District Designated Coordinators of Special Education (January 18, 1996).

Part IV
Three Basic Requirements of ESY Services

Under IDEA 97 federal regulations, the provision of ESY services is made up of three basic components. AEAs and LEAs are encouraged to emphasize these three when training their personnel. Because these basic principles are so important to the legal provision of ESY services, each of them will be discussed and explained in this part.

(1) All children who are eligible for special education and related services are to be considered for ESY services.

The basis for determining eligibility for ESY services is identical to the basis for determining FAPE: A child is eligible for and entitled to ESY services to the full extent that he or she needs those services to secure FAPE.

> The legal basis including the procedural and substantive requirements for EYSE [is] derive[d] from the concept of FAPE. Eligibility is determined by individual need, guided by the criteria for an appropriate education. The extended program–which will allow the child to secure the benefits of a free and appropriate education–has the same procedural and substantive requirements as the IEP developed for the school year.[3]

The comment section of the federal IDEA regulations clarify that every child is not entitled to receive ESY services but all are entitled to consideration of such.

Children with disabilities who transition from Early ACCESS services (Part C early intervention program for infants and toddlers ages birth to three) to Part B (students with IEPs) also must rely on FAPE for ESY services eligibility. The Part C lead agency or grantee designee and the family of the two-year-old must meet with the district to discuss the child's transition to Part B services at least 90 days (and at the discretion of the parties, up to six months) before the child turns three. Children with disabilities who have their third birthday during the summer months are not automatically entitled to receive special education and related services during the summer. ESY services are provided during the summer only if the IEP team determines that the child needs ESY services during the summer in order to receive

[3] ***In re Ruffin W.***, 13 D.o.E. App. Dec. 218, 226 (ALJ Iowa 1996).

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FAPE.[4] In special circumstances, the transition plan and IEP team could determine that in order to ensure a smooth transition with no interruption of services, Part C funds and IFSP services could continue until the IEP programs are implemented.[5] Further clarification will be available from Early ACCESS (rules, guidance papers, policies and procedures).

The Iowa Administrative Code (2000) reasserts the expectation that **all** children who qualify for special education and related services are automatically eligible for ESY services; thus, an eligible individual is "an individual with a disability who is handicapped in obtaining an education and who is entitled to receive special education and related services."[6] As stated earlier, this is not limited to students in specific disability categories, levels of need or severity of disability.

In addition, the Iowa Administrative Code (2000) requires IEP teams to consider ESY services not only for eligible students who receive special education instructional and related services but for those receiving *support* services. Related services include transportation and developmental, corrective, and other supportive services as are required to assist eligible students to benefit from special education.

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[4] **Comment Section IDEA 97**, pages 12555,12559

[5] **CFR** Section 303.138

[6] Rule 41.5, **Iowa Rules of Special Education (2000)**.

(2) All relevant information relating to the individual needs of the child must be considered.

All information relevant to the question of what constitutes FAPE for a child with a disability must be considered by the IEP team as a basis for entitlement to an ESY services program under the IDEA and Iowa Administrative Code. *Relevant information* includes consideration of data from independent educational evaluations. Any rule, policy, or procedure which purports to restrict this full consideration of all relevant information is contrary to the IDEA. In fact, the Comments section of the regulations state,

> ...the examples of standards that were included in Note 2 (e.g., likelihood of regression, slow recoupment, and predictive data based on the opinion of professionals) are derived from well established judicial precedents and have formed the basis for many standards that states have used in making [ESY services] determinations. . . It also should be pointed out that nothing in this part is intended to limit the ability of states to use variations of any or all of the standards listed in Note 2.[7]

This tenet has been well understood for more than a decade, but executive and judicial authorities have recently become more active in enforcing its full implications. As the U.S. Department of Education has determined, "it would not be permissible for a state to adopt a policy of refusing to consider information, such as predictive data, that may be relevant to the determination of whether a preschool child needs ESY services."[8] It should be noted that whenever a reference is made to the use of data in ESY decision making, these data should reflect *multiple* sources and that ESY decision making considers *both* predictive and retrospective data.

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[7] **Comment Section IDEA 97**, page 12576

[8] Policy Letter, 22 IDELR 980, 980 (U.S. Department of Education, March 24, 1995).

(3) Parents have the right of full participation in the development of the IEP, which includes the ESY services decision, and they must be fully advised of their rights.

The opportunity for parental participation in the development of IEPs for their children is a requirement of the IDEA. This emphasis is evident when considering the specific mention of the IEP team in Section 300.309 (a)(2) which states that ESY services must be provided only if a child's IEP team determines, on an individual basis, in accordance with Section 300.340–300.350, that the services are necessary for the provision of FAPE to the child.

Parents are entitled to a meaningful opportunity to participate in the discussion of their child's needs and the formulation of that child's educational plan, which includes being informed about standards for determining eligibility for ESY services. The Comments section of the regulations states,

> ...it is important that states inform parents about standards for determining eligibility for ESY services...Since this matter is relevant to the provision of FAPE, it already would be included in the information contained in the written prior notice to parents provided under this part for children for whom ESY services are an issue.[9]

In order for parents to be full participants, they must be adequately informed of their rights—a duty which can be confusing unless a distinction is made among three types of notice: (1) notice of rights, (2) notice of meetings, and (3) notice of decision. These notices are discussed in greater detail in Part VI.

[9] ***Comment Section IDEA 97,*** page 12576

Part V
Specific Standards
For Implementing Iowa's ESY Services Rule

In response to the federal IDEA 97 requirements that states must establish standards for ESY service eligibility, this part sets forth what these Iowa standards are. The standards include:

(1) Need for Continued Skill Acquisition and Maintenance without Interruption
(2) Regression/Recoupment Concern
(3) Rare and Unusual Circumstances
(4) Other Considerations

(1) Need for Continued Skill Acquisition and Maintenance without Interruption

Historically, the cornerstone of the Iowa ESY services rule, before 2000, has been the determination and identification of critical skills. On its face, this definition suggests that *critical skills* are identical to the developmental priorities identified in the IEP. As ALJ Daniel J. Reschly observed in 1993, "[every IEP goal] would be a critical skill if the only criterion was developmental priorities."[10] Difficulty has arisen, therefore, whenever *critical skills* were interpreted as a determinative eligibility requirement.

It is now clear that the *critical skill* determination cannot be used to limit the availability of ESY services. In response to a system-wide attack on an ESY services rule (similar to Iowa's rule that was in effect at that time), the U.S. District Court for the District of Maryland decreed that, if *critical skills* were defined in a *rigid* manner, so as to prevent the IEP team from fully considering a child's individual needs for an appropriate education, the construct would violate the IDEA.[11] "Such a practice–designed to misfocus ESY service analysis and prevent deserving children from qualifying for it–would certainly raise an issue under the IDEA."[12]

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[10] ***In re Burlington Community Sch. Dist.***, 20 IDELR at 1019.
[11] ***Reusch***, 21 IDELR at 1115.
[12] ***Reusch***, 21 IDELR at 1115.

When considering eligibility for ESY services and applying the Iowa standards, an IEP team should ask several lead questions. Thus, the lead question when examining the need for continued skill acquisition and maintenance without interruption is:

Are there goal areas of concern, which need to be acquired or maintained without interruption for the child to meaningfully benefit from a FAPE?

- Due to child developmental level necessitating continuation of programming (e.g., language development).
- Due to need to facilitate independent functioning (e.g., continued mobility training will decrease the reliance on and necessity of an assistant).

Whenever a reference is made relating to the use of data in ESY services decision making, this data shall reflect multiple sources and ESY services decision making considers both predictive and retrospective data.

Instead of considering the *critical skills* concept, an IEP team will need to address *goal areas of concern* when examining whether a child or student is eligible for ESY services.

First and foremost there must be a goal area where significant concerns exist regarding skill acquisition or maintenance of skills during a break in services. Goal areas should represent skills essential to the progress of the student.

If the current IEP does not contain identified goal areas of concern but there are new *concerns* not addressed, a new IEP may need to be written to reflect new goals, if deemed appropriate by the IEP team. The very nature of the IEP document requires it to be dynamic and rewritten to reflect new needs that in turn will require a consideration of ESY services.

The identification of *goal areas of concern* is only the first step in an ESY services decision process. The identification of *goal areas of concern* does not, in and of itself, establish or preclude the need for ESY services.

(2) Regression/Recoupment Concern

The Comment section of the IDEA regulations clarifies that states may establish standards such as likelihood of regression for determining eligibility for ESY Services.[13]

Regression refers to the inability of a student to maintain an acquired skill, in an identified goal area of concern, as a result of an interruption of special education instruction or support services in an IEP goal area. In addition, a significant amount of reteaching as determined by the IEP team will be required to regain previous competence. In these cases ESY services programming shall be designed to provide for maintenance of skill level.

The lead question the IEP team needs to ask when addressing the regression/recoupment standard is:

Has there been (or is there a potential for) significant regression during periods of interruptions that would require significant recoupment?

The regression-based standard is best viewed as a general guide to identifying those students who need programming beyond the normal school year because these students may experience significant skill regression and require significant recoupment time. Recoupment refers to the amount of time it takes to regain the prior level of functioning.

Several criteria should be considered when applying the regression-based standard.

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[13] **Comment Section IDEA 1997**, page 12576

- First, the availability of ESY services cannot be limited to children who have actually experienced serious regression.

- Second, ESY services regression analysis cannot be limited to *empirical* data. More than one court case on this issue confirms the necessity of allowing for expert opinion or professional judgment which takes into account not only retrospective data but predictive data. For example, the *Johnson* court concluded:

> The analysis of whether the child's level of achievement would be jeopardized by the summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community.[14]

In using such predictive data, it is important to consider multiple data sources such as progress monitoring data on current IEP goals and data provided by the parents.

- Third, some children's needs may be so great that they cannot suffer even the modest regression and recoupment times that would otherwise be acceptable. The matter must be judged on a case-by-case basis. For example, the severity of a child's intellectual or physical impairments may minimize that child's incremental developmental gains to such a degree that services must be virtually continuous for the child to progress and benefit from the educational experience or to achieve the independence from caregivers he or she might otherwise be unable to achieve.[15] Accordingly, guidelines for determining ESY services "must be very flexibly applied to each individual case."[16]

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[14] Johnson v. Independent School DistrictNo.4, 921 F.2d 1022, 1028, 17 EHLR 170 n.4(10th Circuit 1990)

[15] Case No. SE-13-85, 1985-86 EHLR 167, 170 (Ill. 1985).

[16] Case No. SE-13-85, 1985-86 EHLR at 170.

(3) Rare and Unusual Circumstances

A guiding presumption of public education is that the educational needs of most children, both disabled and nondisabled, can be met within the normal school year of the public agency. For must public agencies, the normal school year is 180 school days. Indeed, the provision of ESY services is the exception, not the rule. A system which required all children with disabilities to attend summer school would not be acceptable to either parents or educators. If IEP teams identify large numbers of children in need of ESY services, it may, in fact, be a signal that the normal school year programs presently offered should be reevaluated. Obviously, other factors, including the development of new programs serving targeted populations, movement of families from one district to another who are seeking a desired program, or new emerging interventions that offer significant benefits for students with disabilities may contribute to this pattern as well.

Since the object is "to move away from a strict and narrow determination to a broader consideration of all relevant information concerning the unique needs of a child,"[17] it is apparent that *rare and unusual* must be thoughtfully applied.

On the one hand, since only a minority of children have disabilities which qualify them for special education, each and every child could legitimately claim that his or her case is *rare and unusual*. This argument is not acceptable. On the other hand, it is equally unacceptable to argue that, although a particular child has multiple disabilities, some of which are extremely rare, his or her case is not *rare and unusual* compared to other children with identical disabilities. Under this argument, virtually no child would qualify for ESY services.

Given the fact that *rare and unusual* can be interpreted to support equal and opposing extremes, Iowa standards establish a series of criteria that should be used to determine if a child's circumstances are such that ESY services should be awarded. These criteria are derived from case law and should be viewed as a practical elaboration of what constitutes *rare and unusual* circumstances within the meaning of the Iowa standard.

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[17] ***In re Ruffin W.***, D.o.E. App. Dec. at 246.

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The lead question the IEP team needs to ask when addressing the rare and unusual circumstances standard is:

Are there rare and unusual circumstances that necessitate continuous instruction or service?

- First, the case is rare and unusual and ESY services may be awarded when the child is in a *critical stage* of development–when there is a *window of opportunity* that will be lost if services are not provided. For example, there are circumstances in which a child with the diagnosis of autism may have a given window of opportunity for learning specific behaviors. The case for ESY services may be strong in this circumstance. Other examples include a student who requires immediate mastery of a skill (e.g., safety, swallowing) or requires continuous programming due to abrupt changes in physical, sensory, mental capacity (e.g., visual training or using a wheelchair).

As stated earlier, ESY services may be awarded when such services will significantly enhance a child's ability to function independently. A child is ***eligible*** for ESY services if, with the aid of those services, he or she is reasonably likely to make significant advances toward the goal of self-sufficiency.

- Second, the case may be rare and unusual and ESY services may be awarded when continuous or year-round treatment is an integral part of the methodology deemed to be appropriate for the child. Thus, one criteria for awarding ESY services is "whether the requested service is 'extraordinary' to the child's condition, as opposed to an integral part of a program for those with the child's condition."[18] As an example, where the methodology chosen for a child was "designed to be administered year-round," a federal court ruled that ESY services were mandated.[19] Where the benefit derived from a program is related to its "intensity" or continuity over time, the selection of the appropriate program itself may determine whether uninterrupted services are necessary for the child to progress.[20]

Given the broad mandate of this language, the most viable interpretation of Iowa's ESY services standards is one in which the IEP team considers all relevant information pertaining to a child's need for services beyond the normal school year in order to secure the benefits of FAPE. If the need is there, ESY services must be provided–and the circumstances are, by definition, rare and unusual.

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[18] ***Johnson,*** 921 F. 2d at 1027; ***see also, e.g., In re Brunswick School Dept.,*** 22 IDELR 1004, 1007 (ALJ Maine 1995).

[19] ***Delaware County Intermediate Unit No. 25 v. Martin K.,*** 20 IDELR 363, 377 n.36 (E.D. Pa. 1993).

[20] ***See Delaware County Intermediate Unit No. 25 v. Martin K.,*** 20 IDELR at 367-68.

(4) Other Considerations

The lead question the IEP team needs to ask when addressing other considerations is:

Are there other factors to be considered in determining the child's need for ESY services?

ESY services may be awarded when there are special needs for summer services arising out of a child's individual circumstances. In *Johnson v. Independent School District No. 4*, the Tenth Circuit offered the following list of possible factors justifying ESY services:

- The degree of impairment of the child.
- The degree of regression suffered by the child.
- The child's recovery time from regression.
- The ability of the child's parents to provide educational structure at home.
- The child's rate of educational progress.
- The child's behavioral and physical problems.
- The availability of alternative resources.
- The ability of the child to interact with nondisabled children.
- The areas of the child's curriculum which need continuous attention.
- The child's vocational needs.
- Whether the requested service is extraordinary for the child's condition, as opposed to being an integral part of a program for children with the same condition.[21]

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[21] ***Johnson,*** 921 F. 2d at 1022, 17 EHLR at 174.

The *Johnson* court also expressly stated that "[t]his list is not intended to be exhaustive."[22]

It must be noted at this point, that the Comments section of the regulations states, "In most cases, a multi-factored determination [regarding the necessity for ESY services] would be appropriate…" The Comments continue by stating, "…but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based on one criterion or factor"[23] further emphasizing the importance of making individualized ESY services decisions.

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[22] ***Johnson,*** 921 F. 2d at 1030 n.9, 17 EHLR at 176 n. 9.
[23] ***Comment Section IDEA 97,*** page 12576.

Part VI
Related Issues of Concern

The Applicability of the LRE Principle

IEP teams are obligated to consider the *least restrictive environment* (LRE) principle during ESY services decision making in the same manner as during the regular school year. As the U.S. Department of Education has observed, "if the participants on the IEP team determine that the child requires an extended school year program in order to receive FAPE, that program must be provided to the child in the least restrictive educational setting that is appropriate to educate the child."[24] In short, it is important that summer programs for children with disabilities should be designed to provide for participation in services and activities with children without disabilities to the maximum extent appropriate.

> While ESY services must be provided in the LRE, public agencies are not required to create new programs as a means of providing ESY services to students with disabilities in integrated settings if the public agency does not provide services at that time for its nondisabled children. However, consistent with its obligation to ensure that each disabled child receives necessary ESY services in order to receive FAPE, nothing in this part would prohibit a public agency from providing ESY services to an individual disabled student in a noneducational setting if the student's IEP team determines that the student could receive necessary ESY services in that setting.[25]

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[24] ***Response to Skiba,*** 18 IDELR 592, 594 (U.S. Department of Education 1991). ***See also Response to Myers,*** 213 EHLR 255, 256 (OSEP 1989).

[25] ***Comment Section IDEA 97***, page 12577.

Notice to Parents

(1) Notice of IEP Rights and Procedures

Regarding notice to parents involving ESY services, the Comments section of the regulations states, "Although it is important that States inform parents about standards for determining eligibility for ESY services, a regulatory change is not necessary. Since this matter is relevant to the provision of FAPE, it already would be included in the information contained in the written prior notice to parents provided under this part for children for whom ESY services are an issue."[26]

Prior written notice must be provided at the following times:

(1) When a student has been determined to need ESY services by the IEP team

(2) When a parent requests ESY services, but the other IEP team members decide ESY services are not warranted

It also is essential that parents be advised of their rights before the IEP meeting at which ESY services are discussed. This is accomplished by providing parents with, and making reasonable efforts to ensure that they understand, the brochure entitled *Procedural Safeguards Manual for Parents (Parental Rights in Special Education)* provided by the Iowa Department of Education or the AEA.

Parents have a right to appeal any decision made by the IEP team relating to ESY services, and an administrative law judge has at least 45 calendar days before rendering a decision. The IEP team needs to provide a formal decision at least 45 calendar days before the services would possibly commence. A rigid 60-calendar day requirement before the interruption of services cannot be established.

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[26] ***Comment Section IDEA 97***, page 12576.

(2) Notice of Meetings

Parents are to be "afforded the opportunity to participate" by being notified of the meeting "early enough to ensure they have an opportunity to attend" and by being advised of the "purpose, time and location of the meeting and who (name and position) will be in attendance."[27] These procedural safeguards exist to ensure that parents are "equal participants," who, along with school personnel, are involved in developing, reviewing, and revising the child's IEP.[28] Among these procedural safeguards, there is also the requirement that parents are advised, prior to the meeting, of their parental rights. This is accomplished by providing parents with a copy of Iowa's brochure entitled *Procedural Safeguards Manual for Parents (Parental Rights in Special Education).*

A consideration of ESY services should be a part of any IEP meeting and therefore does not necessitate being listed separately in the purpose statement when notifying parents about an upcoming IEP meeting. However, if a separate meeting were to be held to consider ESY services *only* or a discussion has already occurred that indicates ESY services will be a specific and significant area for decision making. ESY considerations would need to be included as part of the purpose statement. In addition, parents should be made aware, through the notice procedures, of any data the parents can bring to meetings addressing ESY decision making that may contribute to the decision as to whether a student requires ESY.

(3) Notice of Decision

The IDEA and the Iowa Administrative Code require that parents be provided with written notice a reasonable time before an agency proposes to initiate or change the identification, evaluation or education placement of the child or the provision of FAPE to the child.[29] The provision of ESY services–or the failure to provide ESY services–comes within the embrace of this requirement. Accordingly, the notice of the IEP team's ESY services decision must include the following elements:

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[27] Rule 41.64(1) Iowa Rules of Special Education (2000).
[28] ***See id.*** at Appendix A, Part 300 - Notice of Interpretation, Question 5.
[29] 41.104, Iowa Rules of Special Educaton (2000).

41.104(1) IAC.

a. A description of the action proposed or refused by the agency.

b. An explanation of why the agency proposes or refuses to take the action.

c. A description of any other options the agency considered and the reasons why those options were rejected.

d. A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action.

e. A description of any other factors that are relevant to the agency's proposal or refusal.

f. A statement that the parents of an eligible individual have protection under the procedural safeguards of these rules and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained.

g. Sources for parents to contact to obtain assistance in understanding the provisions of these rules.

It should be noted that "a-e" are longstanding requirements of written prior notice; "f" and "g" first appeared in the IDEA 1997 statute.

Part VII
Recommendations

The Iowa Department of Education believes in the simple proposition that every child's needs should be individually considered in making the ESY services decision.

The Iowa Department of Education also believes that a *best practices* approach should embrace the following concepts:

(A) Following the discussion of the special education needs for any student with disabilities, the IEP team should *brainstorm* to identify and explore all available community options and other educational opportunities that would be beneficial to the child during the summer months. The full array of available options can then be considered. The IEP team should then specifically identify any services that are necessary to ensure an appropriate public education. These services identified as necessary for FAPE must be provided at no cost to the parents and are referred to as ESY services. Through this process, IEP team members and parents will also be made aware of additional programs or activities which may be beneficial for their child should they choose to pursue them independently.

(B) IEP teams should have the benefit of a consistent strategy within their AEA for considering ESY services options for a child with a disability. This AEA structure should encompass the concepts discussed in Part V of this document.

(C) AEAs and LEAs should develop lists of community resources that can be accessed by school districts for purposes of meeting the summer educational needs of children with disabilities including ESY services.

(D) AEAs and LEAs should continuously work to develop innovative techniques for meeting the summer educational needs of children with disabilities–techniques which require a less intensive investment of both the school's resources and the student's time. Several educators have identified *maintenance strategies* that could prove to be of great assistance in providing summer services to children with disabilities. For example, if a junior high student were secured a summer job reading stories to younger children at the local library, that position alone might be sufficient to prevent a regression of tenuously acquired reading skills.

However, while pursuing these best practices IEP teams must also keep in mind:

1) any extended school year services program must be included within the student's IEP;

2) goals, objectives, or milestones related to ESY services must be present;

3) monitoring and supervising ESY services, even if directly delivered by other community resources, are still the responsibility of qualified special education personnel; and

4) ESY services must be at no cost to the parent. As examples, there are times when transportation must be at no cost or enrollment fees would not be assumed by the parent if required for access to a particular program.

This document is not intended to be conclusive, but to suggest a direction for focusing cooperative efforts to provide ESY services for special education students. AEA personnel, school district personnel, parents, and IEP teams across the state need to pool ideas and to find creative and effective ways to stretch limited resources to meet the ESY services needs of all Iowa children with disabilities.

Appendix
Extended School Year Services
Work Group and Committee Membership

2000 ESY Services Work Group (2000)

Jim Stumme, Heartland AEA 11 Special Education Director
Greg Robinson, Associate Superintendent, Urbandale Community School District
Sharon Kurns, Supervision of Instruction Services, Heartland AEA 11
Deb Samson, Parent Educator Connection
Lisa K. Heddens, Family Support Coordinator, Parent Training and Information Center
Lynda Pletcher, State Coordinator, Part C/ Early ACCESS, Department of Education
Carl Smith, Administrator/Professor, Drake University Resource Center for Issues in Special Education
Maria Walinski, Graduate Assistant for Carl Smith
Curt Sytsma, Attorney
Dee Ann L. Wilson, Consultant, Bureau of Children, Family and Community Services, Department of Education

The publication resulting from this work group started with the 1997 Field Edition as the basis for the framework, with major revisions being made that reflected OSEP regulations, OSEP comments, and Iowa standards. The primary revision writers were Anna Jessop, Carl Smith, and Dee Ann Wilson, with input offered by multiple contributors. Reviewers were Tim Pepper, Heartland AEA; Norma Lynch, Department of Education; Julie Curry, Technical Assistant, Early ACCESS; Lisa Heddens, Parent Training and Information Center; The Kid Coalition (members include: Valerie Findley, Paula Connolly, Lori Reynolds, Cindy Laughhead, Jule Reynolds, Marcia Vrankin, Bill Gorman, and Lisa Heddens); Karie Martindale, Southern Prairie AEA; and Dr. Pauline Sampson, Ames. Special recognition is given to ALJ Susan Etscheidt, and the AEA special education directors who helped critique the revisions. Other invaluable contributors include Sara Bloxham, Lisa Yenzer and Mary Bartlow.

Ad-Hoc Committee (1995-97)

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Dee Ann L. Wilson, Bureau of Special Education

Curt Sytsma was the primary writer of the Field Edition (1997), with input offered by the committee members.